

**State Board of Elections  
Task Force on Residency  
Minority Report  
August 28, 2009**

We, the undersigned, serving on the State Board of Election's (SBE) Task Force on Residency, wish to express our general support for the intent of the Task Force's proposed regulations on voter residency, but we wish, too, to voice strong reservations and continued questions not yet resolved. In addition, we strongly oppose a salient feature found in the majority's recommendations regarding a registrant's domicile.

First, on the question "to domicile, or not to domicile."

Our objection is that the majority's recommendations effectively remove the condition of a domicile in Virginia as a requirement of voter residency and thus eligibility, among other requirements, for voter registration. In our view, based on statutory and case law, a person's mere physical presence in the state is insufficient to qualify him/her as a registered voter.

Article II, §1 of the Constitution of Virginia says, "Residence, for all purposes of qualification to vote, requires both domicile and a place of abode," as acknowledged in the Task Force's definitions. The domicile is the *principal* abode or dwelling place, and there can be only one of these. The temptation to declare domiciles in multiple states, or even multiple Virginia voting jurisdictions, can be strong among overly zealous partisans, as shown by proven instances of double-voting that have on occasion occurred. These instances often involve persons who attempt to cast votes in each of two or more places, often using mail-in absentee ballots. The fraud has sometimes been caught, although we suspect more occurs than the system is now set up to identify. The majority report takes no cognizance of such fraud and raises little or no barrier against it.

We have five additional concerns and present these below in the order of their appearance in the recommendations. We conclude with a sixth section of general concerns that have a common thread of laxity with regard to running clean, fraud-free elections. These expressed concerns are the product of a consultation of several other general registrars with the undersigned.

**§ 1(c)(iii)**

- a. Va. Code 24.2-114 provides that the general registrar "obtain the information necessary" to complete voter registration applications. See also 2006 Op. Va. Att'y Gen. 128. In addition, Va. Code 24.2-429 gives the registrar or three qualified voters of the county/city the right to challenge the qualifications of any

registered voter. Va. Code 24.2-430 also gives three qualified voters of a county or city the right to directly petition the circuit court. In light of these statutes and the opinion of the Attorney General cited above, a concern about § 1(c)(iii) is that it appears to limit the ability of the registrar to carry out his or her statutory obligations.

- b. Further, we are concerned the use of the phrase "on its face" would have the chilling effect, proscribing registrars from inquiring into the validity or accuracy of a registration even when the registrar is aware of circumstances likely to make that registration inaccurate. For example, if there are dozens of people registered at an address that can only hold 4-5 people at most, this indicates some no longer valid or even fraudulent registrants. That is a circumstance that would be known to few other than the registrar, and the use of the phrase "on its face" indicates that the registrar could not look beyond the four corners of the document to inquire further, notwithstanding the knowledge that a registrar already has or can discover when an anomaly arises. Keep in mind that many localities are close-knit and that registrars know much about their registrants beyond their name on the voter rolls.
- c. Shouldn't "§ 12" at the end be "§§ 12-13"?

**2. § 12**

- a. The phrase ". . . the general registrar may promptly resolve the discrepancies through informal means if the result of the general registrar's efforts is registration of the voter" is unclear. How can the result be known until the process is completed?

**3. § 13**

- a. In the introductory paragraph to § 13, reference is made to "by the time of the next election." This deadline seems to conflict with the deadlines indicated in § 15(d).
- b. Regarding the "form prescribed by the Board": we are concerned that there is not already a draft of this form. In order to pre-clear this process to move forward, a copy of the form prescribed by the SBE will need to be included in the pre-clearance package sent to the U.S. DOJ, or else there will need to be a subsequent clearance of the form. We hope this will be available for comment by the elections community before it is submitted, as well.
- c. How does the statutory scheme of confirmation notices in Va. Code 24.2-428.1 fit into the rule located at § 13(b)? Also, what other means does the registrar have to obtain an "alternate mailing address"? Presumably this would be phone or email contacts. To what extent would this be documented? Would this information be retained in VERIS, or would we only retain it on the back of the written application?

**4. § 14**

- a. See above for comment (b) to § 13.

- b. How would the questions in § 14 elicit information that would enable the registrar to discover relevant information if an applicant has listed an address or raises a situation anticipated in § 13(b), 13(d), and 13(e)?
  - c. The status of an applicant who receives supplemental questions is unclear, when mailed to the applicant by the registrar, are returned as "undeliverable" by the United States Postal Service. We presume that the returned mail would void the application, but it would be good to make this explicit.
5. § 15(d)
- a. See above comment (c) to § 13. Does an out-of-state or out-of-district "alternate address" present a circumstance suggestive of potential double registration?
  - b. In § 15(d), the phrase "period of data entry after the close of books" is undefined. We assume this means the several days subsequent to the close of books, but this phrase is somewhat ambiguous in light of the fact that many localities are now using electronic pollbooks, and data entry could be done even later - up to, and including, Election Day. This would be a significant, *de facto* policy change, which we believe ought to be determined by the General Assembly.

#### 6. General Concerns

- a. As we noted above on domicile, the proposed regulation flies in the face of state and federal case law that recognizes that domicile is not merely expressed intent, but is expressed intent as evidenced by facts to support that expressed intent. As you may recall, the most recent Virginia Supreme Court case, *Sachs v. Horan*, turned on the conflict between Mr. Sachs' expressed intent and the facts that underlay Mr. Sachs' expressed intent. And a federal case, *Dyer vs. Huff* (382 F.Supp. 1313 D.S.C. 1973), clearly states in part "election officials may look behind the mere declaration of residency of a voter to determine the actual facts and circumstances." We do not believe that the proposed regulations, which are intended to bind General Registrars in Virginia, should run counter to Virginia and federal case law.
- b. Additionally, regarding domicile, the failure of the majority document to recognize and in some fashion to warn partisan advocates that there are circumstances which are inappropriate for a person to register and vote in our state further eviscerates the notion of domicile. As was discussed during the meetings, persons, such as very short-term, out-of-state campaign workers, who have no intent to remain in Virginia beyond the period of the elections, do not, in our opinion, have the requisite intent to remain that is required by law. Particularly, in a year in which there are not elections in most of the country, when larger

numbers of such campaign or non-partisan 527 advocates with a definite election outcome as their goal will be flooding Virginia, we are troubled at this omission.

- c. As we noted above in some detail, we think the Task Force's recommendation, insofar as it might be read to restrict the ability of the registrar to obtain information pursuant to Va. Code 24.2-114, conflicts with the Code of Virginia. Further, we are concerned that the recommendation, again insofar as it would restrict the ability of the registrar to obtain information, does not mesh with the general principle of the registrar's right to inquire as articulated in the opinion of the Attorney General at 2006 Op. Va. Att'y Gen. 128.
- d. Under the proposed regulation, will a General Registrar be permitted to send an applicant information about residency so that he/she can make an informed decision about where to register to vote. There was discussion on the Task Force that SBE create such a document, but it was unclear when it would be available. Some applicants are not aware of the issues surrounding residency requirements, and as Chairman Cunningham will recall, Norfolk testified that for some addresses on military bases, when further information was sought, many applicants did not realize when they had applied through DMV and did not intend to change their voter registration.
- e. As expressed by Norfolk, we believe there needs to be a section on the registrant's actual application that asks the following questions:
  - i. "Is Virginia your current residence?"
  - ii. "If not, do you want Virginia to be your residence?"
- f. Further, we are concerned that SBE has not made any attempt to change the voter registration application, as we believe many of the problems discussed in the task force meetings could be substantially reduced with a revised version of the application.
- g. Pending a revision of applications used in Virginia, we request that registrars, when it appears appropriate to prevent significant problems for potential applicants, be able to ask the questions outlined in comment (e) immediately above.

To recap our principal objection, the proposed residency regulation effectively prohibits Registrars from fulfilling their oath to uphold the Constitution of Virginia, which contains a domicile requirement. Domicile is inherently a contextual determination that must be decided on a case-by-case basis. By prohibiting Registrars from making any inquiry into the facts manifesting each applicant's domicile, the proposed regulation (1) handcuffs Registrars from making an independent determination of a registrant's actual domicile and (2) effectively eliminates domicile as a registration requirement. The result is a registration regulation overtly calculated to contravene the Constitution of

**Virginia and established law. While that could be achieved through a Constitutional amendment removing the domicile requirement altogether, it cannot legally be accomplished by an agency regulation.**

**Finally, we wish to express our appreciation for the opportunity to participate in the Task Force, and for the opportunity to share our views and continued concerns. We want publicly to acknowledge that we feel the Task Force process has significantly reduced many problems evident at the start of the process. We well appreciate that all involved appeared genuinely to try and reach consensus, and we regret that the process was truncated before this could be achieved.**

**Signed by:**

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